

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

HISHAEL TAJOLLA YNIGUEZ,

Defendant.

NO. CR-10-6075-EFS

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS INDICTMENT**

A pretrial conference occurred in the above-captioned matter on December 3, 2010, in Richland, Washington. Defendant Hishael Tajolla Yniguez was present, represented by Nicholas Marchi. Assistant United States Attorney Alexander Ekstrom appeared on the United States Attorneys Office's (USAO) behalf. Before the Court was Defendant's Motion to Dismiss Indictment (ECF No. [39](#)), which argued that the Indictment must be dismissed because the underlying 1999 removal order is invalid given that the immigration judge erroneously determined that Defendant was ineligible for relief from removal. The USAO opposed the motion. This Order supplements and memorializes the Court's oral denial of Defendant's motion.

A. Background

In 1987, Defendant, who is a Mexican citizen, obtained lawful permanent residence status in the United States. Then in 1995, Defendant

1 was arrested and indicted for Aggravated Assault with a Deadly Weapon in
2 Potter County, Texas. (EFS No. 42, Attach. A.) At that time,
3 immigration law would have allowed Defendant to seek "§ 212(c) relief"
4 from deportation so long as he served less than five years on the
5 indicted offense, which was an aggravated felony. See 8 U.S.C. § 1182(c)
6 (as enacted prior to Public Law 104-132, 110 Stat. 1214 (1996)).

7 On April 24, 1996, the Anti-Terrorism and Effective Death Penalty
8 Act (AEDPA) was enacted. Pub. L. No. 104-132, 110 Stat. 1214. AEDPA
9 restricted relief from deportation for aliens convicted of certain
10 crimes; in pertinent part, AEDPA eliminated § 212(c) relief for aliens
11 convicted of an aggravated felony.

12 On December 30, 1997, Defendant pled guilty to the state charge of
13 Aggravated Assault with a Deadly Weapon and was sentenced to four years.¹
14 (EFS No. 42, Attach. B.) On April 14, 1998, Defendant was placed into
15 removal proceedings, and on September 28, 1998, the immigration judge
16 found Defendant ineligible for § 212(c) relief because of his aggravated-
17 felony conviction and therefore removable. The immigration judge's
18 removal decision was upheld, and on June 14, 1999, Defendant was ordered
19 removed. (ECF No. 42, Attach. C.)

20 Defendant was found in the United States on September 1, 2010, and
21 on September 14, 2010, was indicted for being an Alien in the United
22 States in violation of 8 U.S.C. § 1326. (ECF No. 13.)

23
24 ¹ Defendant remembered pleading guilty in 1995; however, the Court
25 finds the state-court judgment, which reflects that Defendant pled guilty
26 on December 30, 1997, reliable. (ECF No. 42, Attach. B.)

1 **B. Authority and Analysis**

2 In a § 1326 illegal reentry offense, the existence of a prior
3 deportation or removal order is a predicate element. 8 U.S.C. § 1326.
4 Therefore, a defendant charged with this offense may collaterally attack
5 the underlying removal order. *United States v. Camacho-Lopez*, 450 F.3d
6 928, 929 (9th Cir. 2006). To collaterally attack the prior removal
7 order, the defendant must establish 1) that he exhausted any
8 administrative remedies that were available to seek relief against the
9 order; 2) improper deprivation of the opportunity for judicial review;
10 and 3) that the entry of the removal order was fundamentally unfair. 8
11 U.S.C. § 1326(d). A removal order is "fundamentally unfair" if 1) the
12 alien's due process rights were violated during the underlying removal
13 proceeding and 2) he suffered prejudice as a result. *United States v.*
14 *Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998); *see also United*
15 *States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004).

16 The Court finds that Defendant failed to establish that his due
17 process rights were violated. In *INS v. St. Cyr*, the Supreme Court
18 focused on whether the alien "would have been eligible for § 212(c)
19 relief *at the time of [his] plea under the law then in effect.*" 533 U.S.
20 289, 326 (2001) (emphasis added) (ruling that the Illegal Immigration
21 Reform and Immigrant Responsibility Act of 1996 (IIRIRA) did not
22 retroactively apply and therefore held that St. Cyr was eligible to seek
23 § 212(c) relief). Here, Defendant believed he pled guilty before AEDPA.
24 The state court documents, however, establish that Defendant pled guilty
25 *after* AEDPA: AEDPA was enacted on April 24, 1996, and Defendant pled
26 guilty to the aggravated felony sixteen months later on December 30,

1 1997. Defendant therefore was not eligible to obtain § 212(c) relief at
2 the time of his guilty plea to the aggravated felony. Accordingly,
3 Defendant cannot benefit from *St. Cyr*'s retroactivity analysis.

4 Because Defendant fails to establish a due process violation, the
5 Court need not engage in a prejudice analysis. Accordingly, **IT IS HEREBY**
6 **ORDERED:** Defendant's Motion to Dismiss Indictment (ECF No. [39](#)) is
7 **DENIED.**

8 **IT IS SO ORDERED.** The District Court Executive is directed to enter
9 this Order and to provide copies to all counsel.

10 **DATED** this 7th day of December 2010.

11
12 S/ Edward F. Shea

EDWARD F. SHEA

13 United States District Judge

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